

TERRY DAVID BYERS
Claimant

MORTON BUILDINGS, INC.
Respondent

INSURANCE CO. OF NORTH AMERICA
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

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ORDER

APPEARANCES

RECORD

ISSUES

The Administrative Law Judge denied claimant's request pursuant to K.S.A. 44-512a to assess penalties against the respondent for not paying all compensation due and owing after the respondent appealed the January 28, 1997, Appeals Board Order to the court of appeals. Claimant contends that K.S.A. 1992 Supp. 44-556(c) which was the statute governing appeals on the date of claimant's accident applies instead of K.S.A. 1996 Supp. 44-556(b), the statute in effect at the time the respondent appealed the Appeals Board Order to the court of appeals.

Also contained in claimant's application for penalties was a request pursuant to K.S.A. 44-536(g) for an award of attorney fees. The Administrative Law Judge also denied this request. Claimant contends the Administrative Law Judge erred because K.S.A. 44-536(g) requires an award of attorney fees to claimant's attorney for services performed in all post-award matters.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

On August 11, 1995, the Administrative Law Judge entered an Award in favor of the claimant for workers compensation benefits. The award was timely appealed to the Appeals Board. The Appeals Board entered their Order on January 28, 1997, and the respondent timely appealed the order to the court of appeals. Thereafter, the claimant served a demand on the respondent and its insurance carrier for payment of compensation due pending the appeal to the court of appeals under K.S.A. 1992 Supp. 44-556(c). Pursuant to the provisions of that statute, all compensation due the claimant from the district court decision was payable pending the appeal to the court of appeals. In this case, the past due compensation on the date of the Appeals Board Order was \$42,107.71 and compensation was payable in the future at \$283.42 per week.

Respondent, pursuant to K.S.A. 1996 Supp. 44-556(b), paid the compensation due for the 10 week period next preceding the Appeals Board's Order and was paying the weekly compensation rate pending the decision of the court of appeals. Therefore, the respondent did not respond to the claimant's demand to pay the claimant pursuant to K.S.A. 1992 Supp. 44-556(c). Claimant then filed before the Administrative Law Judge his application to assess penalties against the respondent.

Did the Administrative Law Judge err in denying claimant's request for penalties?

The Appeals Board finds the Administrative Law Judge's Order Denying Penalties entered on October 22, 1997, should be affirmed.

Claimant argues that K.S.A. 1996 Supp. 44-556(b), the current statute that provides for payment of compensation during the appeal time between the date of the Appeals Board Order and the decision of the court of appeals, cannot be applied retroactively because his work-related accident occurred on August 3, 1992, before the 1993 Amendment to the workers compensation act. In other words, the claimant asserts the 1993 Amendment to K.S.A. 44-556 was a substantive change as it affected the vested rights of the claimant.

The Appeals Board has had the opportunity to decide this same issue in the case of Britt v. Theratronics International, LTD., Docket No. 184,811 (August 1997). In Britt, the Appeals Board found the 1993 Amendment to K.S.A. 44-556 was procedural and therefore it applied retroactive to an injured claimant whose accidental injury occurred before July 1, 1993, the effective date of the amendment. The Appeals Board finds it is not necessary to repeat the findings and conclusions contained in Britt in this Order. Therefore, such findings and conclusions are adopted by reference as if specifically set forth herein.

Did the Administrative Law Judge err in not awarding claimant reasonable attorney fees?

In claimant's application for penalties, he also requested an award of reasonable attorney fees for the services his attorney rendered in connection with the application filed and hearings held both before the Administrative Law Judge and the Appeals Board.

Claimant argues that K.S.A. 44-536(g) entitles claimant's attorney to reasonable attorney fees for services rendered to a claimant if such services result in no additional award of compensation. Accordingly, claimant asserts if the Appeals Board does not order respondent to pay compensation in accordance with K.S.A. 1992 Supp. 44-556(c), then this matter should be remanded to the Administrative Law Judge for a hearing to be held on the issue of reasonable attorney fees.

The Administrative Law Judge denied claimant's request for attorney fees. He found the case was on appeal to the court of appeals and therefore not a final order. The Administrative Law Judge also found the penalty statute, K.S.A. 44-512a, does not provide for an award of attorney fees except in the district court. The Appeals Board agrees, that under the circumstances of this case, claimant's attorney is not entitled to an award of attorney fees. However, the Appeals Board so finds for different reasons than those relied upon by the Administrative Law Judge.

The Appeals Board has previously found the penalty proceedings initiated to collect those benefits due and payable during the pendency of an appeal is a proceeding that falls within the definition of K.S.A. 44-536(g) as being subsequent to the ultimate disposition of the initial claim. Additionally, the Appeals Board has found that a proceeding for penalties under K.S.A. 44-512a is a proceeding that falls within the broad scope and application of

K.S.A. 44-536(g) as a proceeding brought "otherwise." See Simmons v. Sim Park Golf Course, Docket No. 186,887 (January 1997).

Claimant, in his brief, acknowledged the Appeals Board decision in Britt addressed the identical issue he had raised in this case. Claimant also acknowledged that the Appeals Board would likely not reverse the decision in Britt. The claimant also announced he had brought this appeal for the sole purpose of preserving the issue for an appeal to the court of appeals.

As previously noted, the respondent has complied with the current version of the appeals statute, K.S.A. 1996 Supp. 44-556(b), and has paid claimant the compensation due pending the decision of the court of appeals. The respondent did not comply with claimant's demand to pay compensation due under the statute in effect prior to the 1993 Amendment. The respondent has complied with the law as it is written and in effect at this time.

The Appeals Board finds it is not reasonable, under the circumstances of this case, to order the respondent to pay attorney fees to claimant's attorney for services rendered for the sole purpose of attempting to determine whether a current statute the respondent is required to follow has retroactive or prospective application. If the claimant desires to make such an argument, the Appeals Board finds he has that right, but it is not reasonable to require the respondent to finance the argument.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order Denying Penalties which also contained an order denying claimant attorney fees entered by Administrative Law Judge Floyd V. Palmer on October 22, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's ruling that claimant is not entitled to an award of reasonable attorney fees for his attorney's efforts in this post-award proceeding. Although the Appeals Board has previously decided the legal issue that prompted this appeal, the appellate courts have not. Therefore, claimant's argument is not frivolous and he is entitled to reasonable attorney fees under K.S.A. 44-536(g) for his attorney's attempts to collect the benefits awarded.

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Vincent A. Burnett, Wichita, KS
John C. Nodgaard, Wichita, KS
Administrative Law Judge, Topeka, KS
Philip S. Harness, Director